

MAR 7 2008

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP No.	SC-07-1335-DoKMk
	)		
ECV DEVELOPMENT, LLC,	)	Bk. No.	07-00052
	)		
Debtor.	)		
	)		
DANIEL HOLBROOK; SUPPA,	)		
TRUCCHI, & HENEIN, LLP,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
EMERALD BAY FINANCIAL, INC.;	)		
C.N.A. FORECLOSURE SERVICE,	)		
INC.; UNIFIED MORTGAGE	)		
SERVICES, INC.; STUART	)		
WEINSHANKER; FBO FIRST TRUST	)		
CORPORATION; NORMAN BENNETT;	)		
BETTY WALLACE; MILAN KISER;	)		
MARIKA MOLIN,	)		
	)		
Appellees.	)		

Argued and Submitted on January 23, 2008  
at San Diego, California

Filed - March 7, 2008

Appeal from the United States Bankruptcy Court  
for the Southern District of California

Honorable John J. Hargrove, Chief Bankruptcy Judge, Presiding

Before: Donovan,<sup>2</sup> Klein, and Markell, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP R. 8013-1.

<sup>2</sup> Hon. Thomas B. Donovan, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

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On August 27, 2002, Emerald Bay made 23 individual loans in the amount of \$32,000 each to Olive XXIII, LLC (Olive XXIII). Each loan was secured by a deed of trust on one of Olive XXIII's 23 vacant lots located in El Centro, California (collectively, the Property). At the same time, Emerald Bay made loans to Olive XXIII in the amounts of \$54,000 and \$134,000, also secured by the Property.<sup>3</sup> Emerald Bay assigned all its interests under the notes to investors and later reacquired some of its interests.

By 2003, Olive XXIII had defaulted in its payments on all the Loans, and one of the Investors, Emvest Mortgage Fund, Inc. (Emvest), initiated foreclosure proceedings. The foreclosure sale was scheduled for October 8, 2003 (Foreclosure Attempt 1).

<sup>3</sup> The 25 loans are referred to collectively, as applicable, as the Loans.

1 Olive XXIII filed a petition for chapter 11<sup>4</sup> relief (Olive 1) the  
2 day before the foreclosure sale.

3 During Olive 1, the bankruptcy court ordered monthly  
4 adequate protection payments. Eight months later, Olive XXIII  
5 defaulted on its adequate protection payments. At an order to  
6 show cause hearing on June 24, 2004, it was revealed that three  
7 prior monthly payments were made on Olive XXIII's behalf by the  
8 AtVantage Group, Inc. (AtVantage).<sup>5</sup> The bankruptcy court  
9 determined that the AtVantage payments, made without prior  
10 approval of the court or U.S. Trustee, were a gift from AtVantage  
11 to Olive XXIII.

12 Olive XXIII's attorney requested a continuance of the June  
13 24, 2004 hearing on a then pending relief from stay motion  
14 asserting that the default in monthly adequate protection  
15 payments had been caused solely by Olive XXIII's need to complete  
16 its funding arrangements and that his client was in a position to  
17 retire all the Loans. Despite Olive XXIII's request, the  
18 bankruptcy court declined to continue the stay relief hearing,  
19 granted relief from stay, and dismissed Olive 1 with a 180-day  
20 bar against re-filing.

21 Less than a week after dismissal of Olive 1, Olive XXIII  
22 filed suit (State Court 1) in the Imperial County Superior Court  
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24 <sup>4</sup> For the purposes of this memorandum, and unless otherwise  
25 indicated, all chapter and section references are to the  
26 Bankruptcy Code, 11 U.S.C. §§ 101-1352, as revised by The  
27 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
28 Pub.L. 109-8, Apr. 20, 2005, 119 Stat. 23 ("BAPCPA"). All two  
digit rule references are to the Federal Rules of Civil Procedure  
and all four digit rule references are to the Federal Rules of  
Bankruptcy Procedure.

<sup>5</sup> Holbrook is the principal officer of AtVantage and also  
the principal officer of the debtor, ECV.

1 seeking a preliminary injunction against foreclosure. On August  
2 5, 2004, Olive XXIII voluntarily dismissed its injunction suit in  
3 response to the Investors' motion for judgment on the pleadings.  
4 A foreclosure sale was scheduled for August 10, 2004 (Foreclosure  
5 Attempt 2).

6 While Olive XXIII claimed in June to have funds to retire  
7 all the Loans, on August 9, 2004, the day before Foreclosure  
8 Attempt 2, AtVantage, through Holbrook, paid Emerald Bay  
9 \$165,951.33 to retire only the \$54,000 loan. Olive XXIII then  
10 executed a quitclaim deed for the Property in favor of AtVantage,  
11 in consideration of the \$165,951.33 payment, the three prior  
12 adequate protection payments, and other promises made by  
13 Holbrook.<sup>6</sup>

14 On March 23, 2005, AtVantage transferred title to the  
15 Property by grant deed to ECV, a newly formed limited liability  
16 company. The apparent consideration for the grant deed was ECV's  
17 promise to pay AtVantage \$406,619. The new entity, ECV, was  
18 formed with three managers and one member, AtVantage. Six days  
19 after its formation, ECV picked up where its predecessors had  
20 left off; it filed suit (State Court 2) in the Imperial County  
21 Superior Court, *inter alia*, to quiet title against Emerald Bay  
22 and the Investors.

23 The superior court granted ECV's request for a temporary  
24 restraining order on March 30, 2005, and after a hearing granted  
25 a preliminary injunction on June 2, 2005, again delaying the  
26 Investors' foreclosure efforts.

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27  
28 <sup>6</sup> The reference to "other promises made by Holbrook" is  
found in the Bankruptcy Appellate Panel's (Panel) earlier  
memorandum disposition affirming the bankruptcy court's earlier  
order dismissing ECV's first chapter 11 case.

1 After several months of discovery, Emerald Bay and four  
2 other Investors, all named as defendants in ECV's State Court 2,  
3 moved for summary judgment on ECV's complaint. On May 26, 2006,  
4 the state court granted summary judgment in favor of the  
5 Investors. Subsequently, the holders of the Loans rescheduled  
6 the foreclosure sale for June 27, 2006 (Foreclosure Attempt 3).  
7 The day before the sale, Olive XXIII filed its second chapter 11  
8 bankruptcy petition (Olive 2), claiming an ownership interest in  
9 the Property and thereby delaying foreclosure again.

10 On July 25, 2006, the state court denied ECV's motion for  
11 reconsideration of the summary judgment order in favor of the  
12 Investors. Three days later, on July 28, 2006, ECV filed a "bare  
13 bones" chapter 11 bankruptcy petition (ECV 1) listing its  
14 challenged interests in the Property as its only assets. In  
15 addition, on July 31, 2006, ECV returned to State Court 2 to  
16 appeal the summary judgment order and the order denying the  
17 motion for reconsideration.

18 In August 2006, Olive 2 was consolidated with ECV 1. One  
19 month after consolidation, the bankruptcy court dismissed Olive 2  
20 as having been filed in "bad faith." On September 25, 2006,  
21 Emerald Bay and two other Investors filed a motion to dismiss or  
22 convert ECV 1 to a case under chapter 7. On October 20, 2006,  
23 ECV filed a motion to employ Law Firm, retroactively.<sup>7</sup> The  
24 motion to dismiss was granted on November 9, 2006, and ECV 1 was  
25 dismissed as a bad faith filing.

26 The Investors rescheduled the foreclosure sale for January  
27 9, 2007 (Foreclosure Attempt 4), a date that was more than three  
28 years after the Investors' foreclosure efforts had commenced.

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<sup>7</sup> Law firm had represented ECV since ECV's State Court 2 was  
filed on March 29, 2005.

1 ECV appealed the dismissal of ECV 1 on December 7, 2006.  
2 That same day, an escrow account managed by Holbrook was opened  
3 in the name of Pacifica West Financial, Inc. (Pacifica), and  
4 Pacifica's escrow designee opened communications with the  
5 Investors, apparently to elicit interest in settlement. The  
6 correspondence exchanged is not furnished in the record by either  
7 side. Appellees assert the correspondence was overly vague and  
8 nonspecific. The correspondence, according to Appellees'  
9 position, lacked both a purchase price and any concrete payment  
10 offer. Appellants have directed us to no other evidence in the  
11 record.

12 On January 8, 2007, the day before the then-scheduled  
13 foreclosure sale, ECV filed with the bankruptcy court an  
14 emergency motion for stay pending appeal. At the same time, ECV  
15 also filed a second chapter 11 bankruptcy petition (ECV 2).<sup>8</sup> Ten  
16 days later, the bankruptcy court denied ECV's motion for a stay.<sup>9</sup>  
17 On January 26, 2007, the Investors filed a motion for relief from  
18 stay in ECV 2. The bankruptcy court granted the motion on  
19 February 23, 2007, ruling that ECV 2 was part of "a scheme  
20 involving an attempt to delay and hinder debtor's creditors, as  
21 well as a scheme involving multiple bankruptcy filings affecting  
22 the real property at issue."

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23  
24 <sup>8</sup> ECV's second bankruptcy petition was signed by Holbrook  
and Raymond Lee, an attorney in the Law Firm.

25  
26 <sup>9</sup> There is a discrepancy regarding the date the bankruptcy  
27 court's Order Denying Motion For Stay Pending Appeal was entered.  
The stamp on the first page of the order reads "Entered Jan. 19,  
28 2006." The date line on bate stamped page 203, line 14, reads  
"January 18, 2007." As ECV 1 was not filed until July 28, 2006,  
January 18, 2007 is correct. The latter date is consistent with  
Judge Hargrove's signature on the order dated January 18, 2007.

1       At the hearing, the bankruptcy court found that there had  
2 been no change in circumstances since ECV had requested an  
3 emergency stay pending appeal in January or since the bankruptcy  
4 court's dismissal of ECV 1. The court also noted that ECV's  
5 multiple bankruptcy cases likely violated the "single estate  
6 rule" and suggested that the Investors file a motion for  
7 sanctions against the Law Firm under Rule 9011. Appellees'  
8 motion for sanctions was filed on March 7, 2007, and scheduled  
9 for hearing on May 16, 2007.

10       On March 7, 2007, ECV filed with the Panel a motion for stay  
11 pending appeal of the dismissal of ECV 1. The Panel denied the  
12 motion two weeks later. On March 20, 2007, after the Panel  
13 denied ECV's motion for a stay, ECV filed in State Court 2 an ex  
14 parte motion to enforce ECV's 2005 preliminary injunction order.  
15 Three days later, the superior court denied the motion, ruling,  
16 *inter alia*, that ECV did not have standing to enforce the  
17 injunction and that the motion did not make out a prima facie  
18 case for relief. The Property was sold at an April 2, 2007  
19 foreclosure sale (Foreclosure Attempt 5) to Emerald Bay and other  
20 Investors.

21       The day before the bankruptcy court was to hear Appellees'  
22 sanctions motion, ECV filed an ex parte motion to continue the  
23 hearing. The bankruptcy court denied the motion for a  
24 continuance. At the May 16, 2007 hearing on Appellees' sanctions  
25 motion, attorney Samy S. Henein appeared on behalf of both the  
26 Law Firm and Holbrook. The bankruptcy court ruled that ECV 2 had  
27 been filed for an improper purpose and was frivolous, and the  
28 court took the question of amount of sanctions under advisement.

1 One month after the hearing on the sanctions motion, the  
2 Panel affirmed the bankruptcy court's order dismissing ECV 1 as a  
3 bad faith filing. In August 2007, ECV 2 was converted to a  
4 chapter 7 case, and the bankruptcy court issued its memorandum  
5 awarding sanctions to Emerald Bay and other Investors in the  
6 amount of \$12,016 against the Law Firm and Holbrook, jointly, and  
7 an additional \$1,000 solely against the Law Firm. The Law Firm  
8 and Holbrook timely appealed the sanctions order.

## 9 10 **JURISDICTION**

11 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
12 We have jurisdiction under 28 U.S.C. § 158(a)(1).

## 13 14 **ISSUES PRESENTED**

### 15 **I**

16 Whether the bankruptcy court abused its discretion by  
17 imposing sanctions against Appellants under Rule 9011 for the  
18 filing of ECV's second bankruptcy petition?

### 19 **II**

20 Whether the imposition of restitutionary sanctions in the  
21 amount of fees and costs incurred as a result of ECV's second  
22 bankruptcy petition violated California's "One Action Rule"?

## 23 24 **STANDARD OF REVIEW**

25 The Panel applies an "abuse of discretion" standard in  
26 reviewing a bankruptcy court's imposition of sanctions. Cooter  
27 & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); Valley Nat'l  
28 Bank of Ariz. v. Needler (In re Grantham Bros.), 922 F.2d 1438,



1 1441 (9th Cir. 1991); Caldwell v. Farris (In re Rainbow Magazine,  
2 Inc.), 136 B.R. 545, 550 (9th Cir. BAP 1992), aff'd, 77 F.3d 278  
3 (9th Cir. 1996). A bankruptcy court abuses its discretion if its  
4 ruling is based on an "erroneous view of the law" or on a  
5 "clearly erroneous assessment of the evidence". Cooter & Gell,  
6 496 U.S. at 405.

## 8 DISCUSSION

9 Appellants contend that the bankruptcy court abused its  
10 discretion in determining that the filing of ECV 2 was  
11 sanctionable conduct. They urge that the bankruptcy court  
12 erroneously interpreted the evidence in determining that the  
13 second petition was filed without any legal basis.

14 They also urge that the bankruptcy court erred in its  
15 conclusion that the filing of ECV 2 was improper as having been  
16 filed "to cause unnecessary delay."

### 17 I

18 In determining whether the bankruptcy court's imposition of  
19 sanctions under Rule 9011(b) was proper, the Panel must determine  
20 whether the bankruptcy court was justified in finding that the  
21 ECV 2 bankruptcy petition was frivolous and was not warranted but  
22 was filed for an improper purpose. Consistent with the realities  
23 of bankruptcy practice, "bankruptcy courts must consider both  
24 frivolousness and improper purpose on a sliding scale, where the  
25 more compelling the showing as to one element, the less decisive  
26 need be the showing as to the other." Marsch v. Marsch (In re  
27 Marsch), 36 F.3d 825, 830 (9th Cir. 1994). "Both the  
28 frivolousness and improper purpose components are measured by an

1 objective standard that looks to reasonableness of the conduct  
2 under the circumstances." Rainbow Magazine, 136 B.R. at 550.

3 The "central purpose" of Rule 9011 "is to deter baseless  
4 filings" in the bankruptcy court and, thus, "streamline the  
5 administration and procedure of the federal courts." Cooter &  
6 Gell, 496 U.S. at 393. See Rule 9011(c)(2). An attorney or party  
7 who signs a paper that violates Rule 9011 may be penalized by an  
8 appropriate sanction, "[including] payment of the other parties'  
9 expenses." See Cooter & Gell, 496 U.S. at 393.

10 In this case, the bankruptcy court cited both Rules 9011 and  
11 11<sup>10</sup> when it imposed sanctions. At the same time the bankruptcy  
12 court noted a relevant and significant difference between the two  
13 rules. Although both rules contain a "safe harbor" provision<sup>11</sup>,  
14 an exception to the "safe harbor" exists in Rule 9011 "if the  
15 conduct alleged is the filing of a petition in violation of  
16 subdivision (b)." Rule 9011(c)(1)(A). This exception bars the  
17 application of the otherwise mandatory safe harbor rule to a  
18 motion for sanctions based on the filing of ECV 2. See Dressler

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21 <sup>10</sup> As the language of the two rules is nearly identical, it  
22 has been recognized that the authorities analyzing Rule 11 are  
23 applicable to proceedings under Rule 9011. Rainbow Magazine, 136  
24 B.R. at 550. As a result, references to the two rules, Rule 9011  
and Rule 11, are sometimes used interchangeably in this  
memorandum.

25 <sup>11</sup> The "safe harbor" in both rules provides, generally, that  
26 a party moving for sanctions may not file or present to a court a  
27 motion for sanctions until 21 days (or such other period as the  
28 court may prescribe) have passed since service of the motion and  
the challenged paper, claim, defense, contention, allegation, or  
denial has not been withdrawn or appropriately corrected. See  
Rules 11(c)(2) and 9011(c)(1)(A).

1 v. The Seeley Co. (In re Silberkraus), 336 F.3d 864, 868 (9th  
2 Cir. 2003).

3 In its sanction ruling, the bankruptcy court cited  
4 Appellants' record of conduct which included the bad faith  
5 dismissal of ECV 1 and the fact that Appellants had appealed the  
6 recent dismissal of ECV 1 at the time ECV 2 was filed. The court  
7 ruled that the filing of ECV 2 was not warranted. The bankruptcy  
8 court also ruled that the filing of ECV 2 was frivolous. The  
9 court distinguished ECV 2 from a proper filing of a successive  
10 bankruptcy petition because ECV 2 lacked a key ingredient to  
11 support the finding of a proper successive bankruptcy petition,  
12 that is, a valid or plausible change in circumstances.

13 Appellants challenge the bankruptcy court's finding that the  
14 ECV 2 bankruptcy petition was not proper. In their briefs and at  
15 oral argument Appellants cited § 349(b)(3) as authority for their  
16 decision to file ECV 2. As Appellants note, under § 349(b)(3)  
17 dismissal of a case "revests the property of the estate in the  
18 entity in which such property was vested immediately before the  
19 commencement of the case . . . ." Appellants argue that as a  
20 result of § 349(b)(3) and supporting case law, the dismissal of  
21 ECV 1 (without regard to the appeal) revested the property of the  
22 estate in ECV and allowed ECV to re-file without violating the  
23 so-called "single estate rule."<sup>12</sup> Appellants also cite two Ninth  
24 Circuit appellate decisions to support their claim that ECV 2 was

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26 <sup>12</sup> In support of their assertion, Appellants cite generally  
27 to In re Studio Five Clothing Stores, Inc., 192 B.R. 998 (Bankr.  
28 C.D. Cal. 1996) (no violation of the "single estate rule" because  
the debtor's chapter 11 estate ceased to exist upon confirmation  
of debtor's chapter 11 plan and prior to the filing of debtor's  
second bankruptcy in chapter 7, initially filed as an involuntary  
petition while the earlier chapter 11 case was still open).

1 filed in good faith. See Downey Sav. and Loan Assoc. v. Metz (In  
2 re Metz), 820 F.2d 1495 (9th Cir. 1987); Grimes v. United States  
3 Farmers Home Admin. (In re Grimes), 117 B.R. 531 (9th Cir. BAP  
4 1990).

5 The bankruptcy court did not abuse its discretion in  
6 determining that ECV 2 was frivolous and was not warranted by  
7 existing law. The term "frivolous," has been used by the Ninth  
8 Circuit to denote a filing that is "both baseless and made  
9 without a reasonable and competent inquiry." Townsend v. Holman  
10 Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990).

11 A petitioner's actions are baseless, under Rule 9011, if  
12 they are not "warranted by existing law or by a nonfrivolous  
13 argument for the extension, modification, or reversal of existing  
14 law or establishment of new law." Rule 9011(b)(2). See Mortgage  
15 Mart, Inc. v. Rechnitzer (In re Chisum), 847 F.2d 597, 599 (9th  
16 Cir. 1988). The filing of successive bankruptcy petitions "does  
17 not constitute bad faith per se." Metz, 820 F.2d at 1497. A  
18 successive filing will be deemed to be baseless if an examination  
19 of the surrounding circumstances leads the bankruptcy court to  
20 determine that the later petition was not filed in good faith.  
21 See Chisum, 847 F.2d at 599. If good faith is not found the  
22 court may impose sanctions under Rule 9011. Id.; see current  
23 version of Rule 9011.

24 From the surrounding circumstances, it is apparent that ECV  
25 desired not only to keep its first bankruptcy estate afloat  
26 through the appeal process, but also to receive the protection  
27 and benefit of a second bankruptcy petition. If either ECV's  
28 request for a stay pending appeal was granted or the appeal from

1 the dismissal of ECV 1 was decided in ECV's favor, ECV would have  
2 had two estates pending.

3 Contrary to Appellants' viewpoint, in each case cited by  
4 Appellants permitting successive bankruptcy filings, the second  
5 bankruptcy petition was permitted only if it was determined to be  
6 a good faith filing. Metz, 820 F.2d at 1498; Grimes, 117 B.R. at  
7 535; Studio Five, 192 B.R. at 1003. Here, however, ECV 2 was the  
8 third bankruptcy case affecting the Property filed within a  
9 relatively short period that also was found to be a "bad faith"  
10 filing. If the Appellants' interpretation of § 349(b)(3) is  
11 accepted, then it would be an exception to the Ninth Circuit's  
12 "good faith" requirement for successive bankruptcy petitions.  
13 Metz, 820 F.2d at 1498; Marsch, 36 F.3d at 828; Chisum, 847 F.2d  
14 at 599; Grimes, 117 B.R. at 535. We find no basis in the record  
15 to consider making such an exception here. The bankruptcy court  
16 concluded that ECV 2 did not represent a legitimate bankruptcy  
17 effort and was not filed in good faith.

18 A "reasonable inquiry," under Rule 11, means an inquiry  
19 reasonable under all the circumstances of a case. Cooter & Gell,  
20 496 U.S. at 401. The standard for assessing reasonableness  
21 becomes more stringent when an attorney has months to prepare a  
22 complaint compared to when he has only a few days before the  
23 statute of limitations is set to expire. See id. When an  
24 attorney has only a few days to investigate, a more cursory  
25 investigation will be tolerated. Townsend, 929 F.2d at 1364.

26 Appellants have offered inadequate evidence to support a  
27 claim that the filing of ECV 2 was either reasonably investigated  
28 under the circumstances or was warranted under existing law or a

1 nonfrivolous argument for an extension of existing law. ECV 1  
2 was dismissed without a 180-day bar to refiling after a hearing  
3 on November 9, 2006. After an order was entered, ECV appealed.  
4 ECV 2 was filed by ECV on January 8, 2007, the same day ECV filed  
5 a motion for stay pending appeal of the dismissal of ECV 1.

6 At the hearing on sanctions, the Law Firm stated that the  
7 lack of a bar to refiling in the November dismissal of ECV 1 left  
8 open the possibility of filing a second bankruptcy. When asked  
9 at the sanctions hearing whether the Law Firm had researched the  
10 issue before filing ECV 2, the Law Firm answered "No."

11 Appellants had ample time to consider their options. One month  
12 passed between the time Law Firm filed an appeal from the order  
13 dismissing ECV 1 and the filing of ECV 2. During this time,  
14 Appellants concede that they conducted no research to determine  
15 whether a second ECV petition was warranted before they filed ECV  
16 2. Under the circumstances, the bankruptcy court's determination  
17 that Appellant's pre-filing inquiry was inadequate was apt,  
18 though not in itself determinative.

19 The bankruptcy court also commented that the filing of ECV 2  
20 just moments after a motion for stay pending appeal in ECV 1 was  
21 filed was a clear case of a bankruptcy petition being filed for  
22 the improper purpose of causing unnecessary delay. As the court  
23 noted in its ruling, Appellants filed ECV 2 just a day or two  
24 before a scheduled foreclosure sale and just moments after ECV  
25 filed its motion for stay pending appeal in ECV 1. The court  
26 concluded that Appellants filed ECV 2 both as an alternative to  
27 its motion for stay pending appeal and also to cause unnecessary  
28 delay and to prevent foreclosure of the Property.

1 Appellants urge here that the filing of ECV 2 was a proper  
2 attempt to preserve their opportunity to resolve ongoing state  
3 court litigation. Appellants also assert that ECV 2 was a proper  
4 attempt to preserve equity in the Property that was justified by  
5 a change of circumstance. Appellants' rest their claim of a  
6 change in circumstance on what they state was Holbrook's  
7 unanswered request for a payoff demand under California Civil  
8 Code § 2943(c)<sup>13</sup> and an unexplained increase in the amounts  
9 claimed to be due on the Loans.

10 The circumstances surrounding the filing of ECV 2, however,  
11 amply demonstrate that the bankruptcy court did not err in  
12 finding that ECV 2 was not intended to serve a valid bankruptcy  
13 purpose but was filed simply as the latest in a series of  
14 desperate acts to forestall foreclosure. In this regard,  
15 "improper purpose" is "measured by an objective standard that  
16 looks to the reasonableness of the conduct under the  
17 circumstances." Rainbow Magazine, 136 B.R. at 550.

18 Rather than a legitimate, reasonable attempt to resolve  
19 Appellees' grievances, the multitude of Appellants' court filings  
20 here, following similar conduct by their affiliated predecessors,  
21 evidences only repetitious and ultimately futile attempts to  
22 forestall foreclosure without notable or adequate substantive  
23 progress toward an effective reorganization. ECV 2 was filed at  
24 the same time Appellants filed a motion for stay pending appeal  
25

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26 <sup>13</sup> Cal. Civ. Code § 2943(c) states, in part, that "[a]  
27 beneficiary, or his or her authorized agent, shall, on the  
28 written demand of an entitled person, or his or her authorized  
agent, prepare and deliver a payoff demand statement to the  
person demanding it within 21 days of the receipt of the demand."

1 from the ECV 1 dismissal order. We find no basis in the record  
2 to fault the conclusion of the bankruptcy court that Appellants  
3 were seeking in ECV 2 another layer of bankruptcy protection  
4 simply to delay foreclosure. As the record reflects, the filing  
5 of ECV 2 was at least the fourth time since Appellants gained  
6 control of the Property of efforts by Appellants, in either the  
7 bankruptcy or state court, to delay foreclosure.

8 Appellants contend they had secured \$1,500,000 in funding to  
9 satisfy the total amount they believed to be owing under the  
10 Loans but when they received the Notices of Default in December  
11 2006, the total amount claimed to be in default was \$700,000 more  
12 than expected. Appellants failed to cite to evidence from the  
13 record to explain how they reached either of these conclusions.  
14 There is, however, evidence in the record that the total owed on  
15 the Loans as of March 27, 2007, was \$2,603,072.19. Unified  
16 Mortgage Services, Inc., one of the Appellees, provided  
17 Appellants' attorney with a series of payoff demands that  
18 detailed the payoff amount for each of the Loans and that when  
19 totaled added up to \$2,603,072.19. The evidence in the record  
20 does not support Appellants' contention that the payoff amount  
21 "doubled without explanation" or that Appellants asked for or  
22 were denied any further explanation.

23 As a final attempt to demonstrate a proper purpose in the  
24 filing of ECV 2, Appellants, in one sentence, assert that ECV  
25 remedied issues concerning the omission of a \$100,000 bond from  
26 ECV's schedules and that ECV filed its schedules with the  
27 petition and a plan and disclosure statement well ahead of the  
28 expiration date of ECV's applicable 120-day exclusivity period.



1 While Appellants do not here explain the substantive content and  
2 meaning of their actions, the bankruptcy court was unpersuaded.

3 This is the fourth bankruptcy case involving the Property  
4 and the third time that a bankruptcy case involving the Property  
5 was found to have been filed in bad faith. At the same time,  
6 Appellants failed to demonstrate to the bankruptcy court that  
7 Appellants had a genuine interest in achieving a reasonable  
8 possibility of a successful reorganization within a reasonable  
9 time when they filed ECV 2 (United Sav. Ass'n of Tex. v. Timbers  
10 of Inwood Forest Assocs. Ltd., 484 U.S. 365, 375-76 (1988)),  
11 resolving any state court litigation issues, or working  
12 purposefully and in a timely manner to avoid the loss of the  
13 Property. There being no persuasive evidence of changed  
14 circumstances to warrant the filing of ECV 2 and no evidence of  
15 new, reasonable, or feasible attempts at plan confirmation, we  
16 cannot conclude that the bankruptcy court abused its discretion  
17 or that its sanction order was clearly erroneous. The  
18 circumstances surrounding ECV's second bankruptcy petition, as  
19 the bankruptcy court found, are sufficient to support the  
20 bankruptcy court's determination that ECV 2 was filed for an  
21 improper purpose and was frivolous.

## 22 II

23 In a last ditch effort to avoid sanctions, the Appellants  
24 raise the argument in their papers that the Rule 9011 sanctions  
25 in this case violated California's One Action Rule. The One  
26 Action Rule provides that a creditor has "but one form of action  
27 for the recovery of any debt, or the enforcement of any right  
28 secured by mortgage upon real property." Cal. Code. of Civ.

1 Proc. § 726(a). The California legislature created the "One  
2 Action Rule" to prevent multiple actions against a debtor when a  
3 creditor elects to sue after a debtor's property has been sold at  
4 a private foreclosure sale. See Robert O. Barton, Foreclosures:  
5 California's One Action Rule, California Lawyer, December 2006,  
6 at 37.

7 The bankruptcy court properly ruled that sanctions would not  
8 result in a "double recovery." The bankruptcy court properly  
9 imposed sanctions to penalize Appellants for their frivolous and  
10 improper second ECV bankruptcy petition and in metering the  
11 sanctions awarded to reimburse Appellees for their attorneys'  
12 fees and costs incurred in opposing the second petition.<sup>14</sup> The  
13 bankruptcy court's ruling did not violate California's "One  
14 Action Rule."

## 15 16 CONCLUSION

17 The reasons thoughtfully outlined by the bankruptcy court  
18 are well-supported by the record and demonstrate that there was  
19 no abuse of discretion in the bankruptcy court's order awarding  
20 attorneys' fees to Appellees for ECV's second bankruptcy case  
21 filing. For the reasons outlined above, we AFFIRM the decision  
22 of the bankruptcy court.

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23  
24  
25 <sup>14</sup> The Appellants did not appeal or challenge the amount or  
26 nature of the sanctions. The bankruptcy court took the amount of  
27 sanctions under submission and permitted supplemental briefing on  
28 the subject. After consideration, the court more than adequately  
justified its decision to grant Appellees' motion and award  
sanctions in the amount of fees incurred in response to ECV 2.